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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-443 OL-01
PUBLIC SERVICE COMPANY OF	)	50-444 OL-01
NEW HAMPSHIRE, et al.	)	On-site Emergency Planning
	)	and Safety Issues
(Seabrook Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO INTERVENORS' MOTIONS
FOR A STAY OF LOW POWER OPERATION
PENDING COMMISSION OR APPELLATE REVIEW

Gregory Alan Berry
Counsel for NRC Staff

May 11, 1989

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INTRODUCTION

The NRC Staff opposes the motions for stay pendente lite of the issuance of a license authorizing low power operation of the Seabrook Station which were filed on May 8, 1989, by the Seacoast Anti-Pollution League (SAPL), the New England Coalition on Nuclear Pollution (NECNP), the Massachusetts Attorney General, and the Town of Hampton (collectively "Intervenors"). See Application For Stay On Behalf Of Seacoast Anti-Pollution League (May 8, 1989) (hereinafter "SAPL Stay Motion"); Intervenors' Motion For A Stay Of Low Power Operation Pending Commission Or Appellate Review (May 8, 1989) (hereinafter "Intervenors Stay Motion"). As explained in this response, a consideration of the criteria governing stay applications set forth in 10 C.F.R. § 2.758(e) militates against granting the requested stay.

DISCUSSION

Section 2.788(e) lists four factors to be considered in determining whether a stay application should be granted. Those factors are:

(1) whether the movant has made a strong showing that it is likely to prevail on the merits;

(2) whether the movant will be irreparably injured in the absence of a stay;

(3) the harm to other parties if a stay is granted; and

(4) where the public interest lies.

10 C.F.R. § 2.788(e). The Staff will address each of these factors in turn.

A. Likelihood Of Success On The Merits

As explained below, none of the four grounds advanced by Intervenors, see Intervenors Stay Motion at 3-8, SAPL Stay Motion at 1-4, is likely to succeed on the merits. 1/

1. Alleged violations of the Atomic Energy Act

Intervenors assert that 10 C.F.R. § 50.47(d), which permits low power operations without a Commission or FEMA finding regarding the adequacy of offsite emergency response plans, violates section 189 of the Atomic Energy Act, which they claim precludes the issuance of a license to operate at any power level until after all issues material to full power licensing have been litigated. Intervenors Stay Motion at 3. This argument already has been considered and rejected by the Commission and

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1/ A fifth ground advanced by Intervenors in support of a stay of low power operation is that they are likely to prevail on the merits of their appeal of LBP-89-04 in which the on-site Licensing Board excluded from litigation a late-filed contention alleging deficiencies in certain on-site aspects of an emergency planning exercise conducted by Applicants in June 1988. See Intervenors Stay Motion at 1, 2-3. In view of the Commission's admonition in its March 22, 1989 Order, the Staff does not address this issue herein but instead relies upon the response filed with the Commission on February 27, 1989. See NRC Staff Response To Joint Intervenors Application For Stay Of LBP-89-04 Pending Appeal (February 27, 1989).

the Appeal Board. Long Island Lighting Company (Shoreham Nuclear Power Plant, Unit 1), CLI-84-21, 20 NRC 1437, 1440 and n.6 (1984); see Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC 485 (1988). Since Intervenors do not even attempt to distinguish their claim from the one presented to and considered by the Commission in connection with CLI-84-21, there is no likelihood that Intervenors will prevail on the merits of their argument that section 50.47(d) violates the Atomic Energy Act.

2. Violation of the National Environmental Policy Act

There also is no likelihood that Intervenors will prevail on the merits of their claim that issuing a low power license without first preparing a new Final Environmental Statement (EIS) or supplementing the 1982 EIS violates the National Environmental Policy Act (NEPA). Stay Motion at 5. This claim too has been considered and rejected by the Court of Appeals for the District of Columbia, the Commission, and the Appeal Board. Cuomo v. NRC, 772 F.2d 972, 974-76 (D.C. Cir. 1985); Long Island Lighting Company (Shoreham Nuclear Power Plant, Unit 1), CLI-84-21, 20 NRC 1437, 1440 and n.6 (1984); Id., CLI-84-9, 19 NRC 1323, 1326 (1984); see Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987). Nothing in the instant stay motion provides a compelling reason for the Commission to depart from earlier announced position on this issue.

3. Intervenors' decommissioning claims

In their stay motion, Intervenors again assert "that the Commission erred in its disposition of Intervenors' petition for a waiver of the financial qualification rule with respect to low power operation."

Intervenors Stay Motion at 7, SAPL Stay Motion at 1-2. There is no likelihood that Intervenors will succeed in persuading the Commission to reverse its decision in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 592-601 (1988). The Commission has on two previous occasions denied Intervenor motions to reconsider that determination. Id., CLI-89-03, 29 NRC ___ (March 7, 1989); Id., CLI-89-07, 29 NRC ___ (May 3, 1989). In CLI-89-03, the Commission rejected the identical claims advanced here (Intervenors Stay Motion at 7) that CLI-88-10 (1) "ignored material evidence bearing on the cost of decommissioning the Seabrook reactor"; (2) "wrongfully engrafted an additional criterion . . . onto the standard for granting petitions for regulatory waivers, without giving Intervenors an opportunity to comment on or address the new standard"; and (3) "reached a merits decision regarding the amount of funding needed for a post-low power decommissioning fund without providing an adequate opportunity for a hearing[.]" See CLI-89-03, slip op. at 6-10.

Intervenors also assert that the decommissioning funding arrangements proposed by Applicants in response to CLI-88-10 do not satisfy the Commission's requirements because under the terms of Applicants' surety bond, the surety's obligation is triggered only "as a result of a denial by NRC of a full power license." According to Intervenors, these funds will not be available in the event Applicants withdraw their full power application. Intervenors Stay Motion at 7. There is little likelihood that this argument will succeed on the merits. As the Staff concluded in its May 3, 1989 report to the Commission, and as Applicants acknowledge, the Commission "has adequate authority to impose necessary decommissioning

funding assurance requirements" should Applicants attempt to withdraw their full power license application. See Staff Evaluation Of PSNH Decommissioning Funding Assurance Plan For Seabrook Submitted In Accordance With Commission Decision CLI-88-10 at 7, attached to Memorandum From Victor Stello To Commissioners (May 3, 1989). Indeed, were Applicants to move to withdraw their application, the Commission could then deny the underlying application itself thereby triggering the surety's obligation under the terms of the bond. Intervenors do not claim the Commission lacks such authority nor have they provided any other basis which suggests the Commission lacks "adequate authority to impose necessary decommissioning funding assurance requirements" should Applicants attempt to withdraw their full power license application.

4. Seabrook Safety Parameter Display System

According to SAPL, its argument that the Licensing Board and the Appeal Board erred in ruling [2/] that the completion of the Seabrook Safety Parameter Display System (SPDS) could be deffered until the first refueling outage is likely to succeed on the merits. SAPL Stay Motion at 2-4. There is no merit to SAPL's position. As the Appeal Board stated in ALAB-865, 10 C.F.R. § 50.57(a)(1) imposes "no requirement that all elements of the SPDS system must be completed before low-power operation in authorized." Seabrook, supra, ALAB-865, 25 NRC 430, 443-44 (1987).

2/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-10, 25 NRC at 177, 183-87 and 194-205, aff'd, ALAB-875, 25 NRC 251 264-67 (1987)

Nothing presented in SAPL's stay motion suggests this interpretation is not correct. 3/

B. Irreparable Harm If A Stay Is Not Granted

As the Appeal Board has observed, "the most significant factor in deciding whether to grant a stay is whether irreparable harm will result in the absence of a stay." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 436 (1987). As explained below, this factors weighs against Intervenors.

Intervenors point to no individualized harm to themselves absent a stay, and state only that there will be increased "risk to the public if a stay is not granted." Intervenors Stay Motion at 9. The Commission has rejected this argument and concluded that the benefits of permitting low-power operation and testing outweigh any possible detriment to the public. See Long Island Lighting Company (Shoreham Nuclear Power Plant, Unit 1), CLI-85-12, 21 NRC 1587, 1590 (1985); see also Seabrook, ALAB-865, 25 NRC at 436-38; Cuomo v. NRC, 772 F.2d 972, 974-76 (D.C. Cir. 1985). Intervenors predicate the claim of increased risk to the public on a statement that the "inadequacies in the training and knowledge of key plant operators" allegedly revealed in the June 1988 exercise "in itself constitutes irreparable harm." Intervenors Stay Motion at 8. However, in the preamble to the final rule (10 C.F.R. § 50.47) which provides that for

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3/ SAPL also makes several claims which it believes warrant a stay of low power operation. SAPL filing at 4-5. SAPL does not provide any basis or discussion of these claims. In these circumstances, no issue is presented for consideration and decision. See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

the issuance of a low power license in advance of the resolution of offsite emergency planning issues, the Commission rejected the premise of this argument, stating:

> The Commission agrees that there may be slightly higher risks due to the plant operators having less experience with the plant at this stage and with a potential for undiscovered design and construction defects. However, in the Commission's view, this risk is significantly outweighed by several other factors. First, the fission product inventory during low power testing is much less than during higher power operation due to the low level of reactor power and short period of operation. Second, at low power there is a significant reduction in the required capacity of systems designed to mitigate the consequences of accidents compared to the required capacities under full-power operation. Third, the time available for taking actions to identify accident causes and mitigate accident consequences is much longer than at full power. This means the operators should have sufficient time to prevent a radioactive release from occurring. In the worst case, the additional time available (at least 10 hours), even for a postulated low likelihood sequence which could eventually result in release of the fission products accumulated at low power into the containment, would allow adequate precautionary actions to be taken to protect the public near the site. Weighing all risks involved, the Commission has determined that the degree of emergency preparedness necessary to provide adequate protection of the public health and safety is significantly less than that required for full-power operation.

"Emergency Planning and Preparedness," 47 Fed. Reg. 30232-33 (July 13, 1982) (footnote omitted). Thus, the Commission has determined that low power operation presents minimal risk to the public health and safety even considering the limited experience of the operators. There is no merit therefore to Intervenors' claim that by not staying low power operation, "the Commission will be greatly increasing the risk to the public." Intervenors Stay Motion at 8.

C. Harm To Other Parties If A Stay Is Granted

The third factor -- harm to other parties if a stay is granted -- favors Applicants. Granting the requested stay will necessarily postpone

the date when Applicants can attain the benefits derived from low power testing. In Shoreham, supra, the Commission identified these benefits:

(1) testing and evaluation of plant systems which cannot be tested or operated at zero power conditions;

(2) evaluation, assessment and familiarization with technical specifications and implementing procedures for the operation of the plant while at low power; and

(3) operator and plant staff experience on the actual plant ion a critical but still low-power operation.

CLI-85-12, 21 NRC at 1590. The Commission also observed that "[s]o long as an applicant is willing to invest the substantial effort and money necessary to attempt to obtain a full power license, the possibility of full operation at a future date give substantial value to low power testing." Id. Because granting the stay requested by Intervenors will delay Applicants' receipt of the benefit of low power testing, the third stay criterion should be weighed in Applicants' favor.

D. Where The Public Interest Lies

Intervenors state that "[t]he public can only benefit from being spared the risks of low power operation, which in and of itself has no benefits, where the possibility of obtaining the benefits of full power operation is so remote." Intervenors Stay Motion at 10. They are not correct. As the Appeal Board noted in Seabrook, supra, ALAB-865, 25 NRC at 446, "the Commission in the Shoreham case provided an analysis of the public interest costs and benefits of low-power testing in circumstances where it is unclear whether full-power operation will ever be authorized." In Shoreham, the Commission held that "the inherent benefits of early low-power testing outweigh the uncertainty that a full-power license may

be denied." CLI-85-12, 21 NRC at 1590. For these reasons, the public interest does not favor a stay of low power operations in this case.

CONCLUSION

The motions to stay the issuance of a low power license for the Seabrook Station filed by SAPL, and jointly by NECNP, the Massachusetts Attorney General, and the Town of Hampton should be denied.

Respectfully submitted,

Gregory Alan Berry
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of May 1989

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTIONS FOR A STAY OF LOW POWER OPERATION PENDING COMMISSION OR APPELLATE REVIEW" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks, by telecopier this 11th day of May 1989:

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